IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**SUIT NO. 1605 OF 1983**

OM NATH CHUDAMANI SHARMA ]
INDIAN ADULT, RESIDING AT ]
ROOM NO. 11, CHAWL NO.3, ]
HARBANS MULAKRAM CHAWL, ]
AMBEWADI PARSI PANCHAYAT ]
ROAD, ANDHERI(E), BOMBAY ] ...PETITIONER.

VERSUS

DEEPAK MAHADEO PATIL ]
INDIAN ADULT, RESIDING AT ]
PRESENT AT FLAT NO. 17/C ]
GROUND FLOOR, LACHMI GIVIND ]
APARTMENTS CO-OPERATIVE ]
HOUSING SOCIETY LTD., ]
JAYA PRAKASH ROAD, NEAR FOUR ]
BUNGALFOWS ANDHERI, VERSOVA ]
ROAD, ANDHERI(W),BOMBAY -58. ] ...RESPONDENT.

MR. M.P.VASHI ALONGWITH ABHAY PANDEY FOR THE PETITIONER/PLAINTIFF.

MR.A.B.PATKI FOR THE RESPONDENT/DEFENDANT.

**CORAM : S.K.Shah, J.**

**Date of Reserving the Judgment : 5-8-2005**
**Date of Pronouncement of the Judgment : 11-8-2005.**

**ORAL JUDGMENT (PER S.K.SHAH,J.)**

1. The Suit is for restoration of possession under Section 6 of the Specific Relief Act.

2. The Suit premises consist of Flat No. 17/C, ground floor Lachmi Govind Apartments Co-operative Housing Society Ltd., Jayprakash Road, Near Four Bungalows Andheri, Versova Road, Andheri (West), Bombay.

3. The Plaintiff alleges that while he was in possession of the Suit flat, on 19th March, 1981, at about 9.30 p.m., when he was taking dinner alongwith his wife, mother and minor child, the defendant came there alongwith 50 persons, armed with deadly weapons, such as swords, knives, iron bars and Lathis and broke open the side door and latch of the front door of the suit flat and forcibly entered into the flat. He further alleges that the defendant alongwith the aforesaid 50 persons dispossessed him and the members of his family, without his consent and otherwise than in due process of law. The Secretary of the society lodged information with police. The police came to the spot at about 10.30 a.m., the same night and drew panchanama. On 20th March, 1981, the society officials wrote a letter to the Commissioner of Police with a copy to D.N.Nagar Police Station, Andheri (W) regarding the aforesaid incident. Since no action was taken by the police, he filed this suit for restoration of possession of the suit premises on 14th September, 1981.

4. The defendant resisted the Suit by filing his written statement, dated 20th December, 1983. While denying all the aforesaid allegations, he contends that he was in possession of the Suit flat since much prior to the alleged date of incident. By way of specific pleadings, the defendant contends that the Plaintiff was a member of the aforesaid Co-operative Housing Society and had paid Rs. 9751/- from time to time in the year 1972. The construction of the building, however, was delayed and the plaintiff, therefore, lost interest in continuing the membership of the flat. He had business relations with the Plaintiff and, therefore, he had secured from Plaintiff room on lease in building situated at Bhayander. Since the Plaintiff felt that he was not in a position to carry out the financial burden of the proposed society and repayment of loan and payment of the instalments of the society charges, he entered into an agreement with the defendant to sell his flat to the defendant, by paying to the Plaintiff, Plaintiff's contribution of Rs. 9751/- and offered to transfer membership in favour of the defendant. The Plaintiff executed such an agreement on 15th October, 1976, on he paying Rs.9751/- to the Plaintiff. The membership of the flat, however, could not be transferred midway construction of the building. He further contends that he had made payment of all the society dues by cheque, pursuant to the agreement and he

is in possession of the receipts thereof, which obviously were issued in the name of the Plaintiff. He further contends that on making such payments, when flat became fit for occupation, he entered into possession of the suit flat and started residing there and using the same. He also took out ration card, obtained electricity and gas connection etc. in respect of the suit premises.

5. The defendant further contends that, in the meantime, emergency was declared and after the emergency period was over, the price of the flat started shooting up, and, as a result, the plaintiff took the somersault and engineered the aforesaid false incident. He contends that although the police visited the spot at about 10.30 p.m. on 19.3.1981, he himself alongwith his family was in possession of the suit flat.

. On these contentions, the defendant claimed dismissal of the Suit.

6. In view of the rival pleadings of the parties, the following issues are framed, against which I have recorded my findings for the reasons given below:-

**ISSUES** **FINDINGS.**

(1) Whether the Plaintiff proves ...In the negative

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| that he was in possession of the suit flat up to 19th March, 1981, as claimed in paragraph 1 of the plaint? | |
| (2) Whether the Plaintiff proves that on 19th March, 1981, the Plaintiff was forcibly dispossessed from the Suit flat as alleged in paragraph 1 of the plaint? | ...In the negative |
| (3) Whether the Plaintiff proves that the Plaintiff was dispossessed of the said Suit Flat, without his consent and otherwise than in due process of law, as claimed in paragraph 2 and 3 of the plaint? | ...In the negative. |
| (4) Whether the Plaintiff is entitled to possession of the suit flat under the provisions of Section 6 of the Specific Relief Act, 1963, as prayed for in the plaint? | ...Not entitle. |
| (5) What Order? | ...The Suit is dismissed with costs. |

**R E A S O N S**

**AS TO ISSUE NOS. 1 TO 3 :**

7. It will be convenient to deal with these issues together.

. The following facts are undisputed.

. Somewhere in 1972, the Lachmi Govind Apartments Co - operative Society Ltd. was formed and the Plaintiff was a member thereof. Initially, he had contributed Rs. 9751/- towards membership. Membership certificate was issued in favour of the Plaintiff. The Plaintiff had executed the agreement, dated 15.10.1976,

in favour of the defendant. As per the terms of the agreement, the defendant was to pay to the Plaintiff, an amount of Rs.9751/-, which the Plaintiff had paid to the Society and that the defendant was to pay the dues of the society in respect of the Suit flat
and ultimately, the Plaintiff had agreed to transfer the membership of the society also in favour of the defendant. It is further undisputed that the payments of dues of the society charges have been made by the defendant, directly to the society, by way of cheques and the receipts for those payments have been issued in the name of the Plaintiff, as the Plaintiff continued to be the member of the society, on record of the society. However, the membership could not be transferred to the defendant as the project was midway.

8. Since the Suit is for restoration of possession, on the ground of previous possession, filed under Section 6 of the Specific Relief Act, it is required to be seen, whether the Plaintiff, as on the date of the incident, which took place on 19.3.1981, was in possession of the Suit flat and that he was dispossessed on the night of 19.3.1981 by the defendant and the defendant entered into possession of the Suit flat at that time. The fact that the agreement between the Plaintiff and the defendant, as stated above, would not be relevant, if there is a conclusive proof with regard

to the possession of the flat and the matter of dispossession of the Plaintiff from the flat by the defendant. However, if there is no conclusive proof, the aforesaid fact, the agreement between the Plaintiff and the defendant would be relevant to consider the case between the Plaintiff and defendant on probabilities.

9. Keeping these aspects in view, I proceed to consider the evidence with regard to Issue Nos. 1 to 3. In other words, I proceed to consider the evidence, whether the Plaintiff has proved that he was in possession of the Suit flat, prior to 19.3.1981 and that whether he was dispossessed by the defendant, on the night of 19.3.1981, without his consent or otherwise in due process of law.

10. The evidence led by the Plaintiff is of himself, his brother in law Bholu Vishnu Sharma on the point of Plaintiffs possession over the Suit flat prior to 19.3.1981. Plaintiff has also further led evidence of Jacob Mathew PW 3, who was the Honorary Secretary of the Society during the relevant period; Tej Raj Soni, PW 4 and Vijay Joshi PW 5, both of them working in Rationing Office; Mr Valvi, PW 6, the Rationing Officer of Bhayander Rationing Office; Mr. Suresh Mistry, PW 7, Junior Clerk working in the office of RTO Thane; Mr. Akhtar Abdul Kadar Athanikar, PW 8 PSI was attached to D. N.Nagar Police Station and D’Silva, PW 9, a Clerk

working in the Nazareth School at Bhayander.

11. As against this, the defendant has examined himself. Both the parties have produced the documents in support of their case.

12. It is pertinent to note that neither the Plaintiff nor the defendant have specified in their evidence, the date on which they entered into the possession of the Suit flat. The Plaintiff states that as on 19th March, 1981, he was in possession of the suit flat and was staying therein alongwith his wife, mother and minor child Krishna. He narrated the incident, which took place on 19.3.1981, stating that at the time of incident defendant went to the flat alongwith Gundas, numbering around 50, armed with deadly weapons, like swords, knives, iron bars etc.; that they broke open the side door and latch of the front door and glasses of both the rooms and w.c. and entered the flat. He further states that defendant assaulted him and dispossessed him and the members of his family from the suit flat. He then states that thereafter, the Secretary of the Society informed the police and the police arrived on the scene, at 10.30 p.m. and made panchanama of the suit premises on the same night. On 20th March, 1981, the office of the Society wrote a letter to the Commissioner of Police, with a copy

thereof to D.N.Nagar police station, Andheri (West). For the first time in the evidence, the Plaintiff has stated that on or about 1st July, 1978, the construction of the flat was completed and possession of the flat was given to him and since then he is residing in the suit flat. The same has been disputed by the defendant. Although the defendant has not disclosed the date when he got the possession of the flat, he has specified in the written statement that he got the possession of the suit flat, when the payments were made and the flat became fit for occupation, he entered into the possession of the suit flat and started residing there, alongwith his family.

13. The Plaintiff has produced documentary evidence to substantiate his claim for being in possession of the suit flat prior to 19.3.1981. The documents are Ration Card, Exhibit- P-1; electricity bill, dated 4.2.1981, at Exhibit.P-2; Inland letter, dated 18.2.1981- at Exhibit P-3; Certificate issued by the Society, dated 24.2.1981 at exhibit P-4; Postal Envelope dated 12.3.1981 at Exhibit P-5 and Inland letter, dated 2.3.1981 at Exhibit P-6.

14. It is pertinent to note that all these documents are of February and March, 1981. The Ration Card at Exhibit P-1, shows the date of issue of the Ration Card

as 12.2.1981. Thus all these documents pertain to February and March, 1981 only. There is not a single document produced by the Plaintiff to show that he had been in occupation of the suit flat since July, 1978. It is surprising to note that none of the residents of the society has been examined by the Plaintiff to substantiate his claim of being in possession of the Suit flat, much prior to March,1981. He has admitted in cross-examination that there are 60 flats in the society buildings; but none of the residents has been examined by the Plaintiff. The Plaintiff has also not examined his wife to support his claim of being in possession of the Suit flat alongwith his family.

15. As against this, the evidence of the defendant shows that somewhere in the month of July, 1978, the Plaintiff himself approached him and, informed him that the society had informed him (plaintiff) that the flat allotted to him was ready for occupation and possession. Accordingly, he himself and the Plaintiff went to the office of the society and met the then Secretary Mr. Raghavan. Mr. Raghavan handed over the keys of the suit flat to the Plaintiff and the Plaintiff in presence of the then Secretary, handed over the keys of the suit flat to the defendant. It is, thereafter that the Plaintiff and he himself went to the suit flat and the defendant took possession of the suit flat. The

defendant has stated that in the month of July/ August, 1978 he shifted the household articles and belongings to the suit flat and started occupying the same. In support, he has produced at Exhibit D-6 an application dated 24.11.1980, made by him to the Hindustan Petroleum Corporation for obtaining the Gas Connection. That was made in the name of defendant's wife. At Exhibit D-7, the defendant produced demand note, dated 24.9.1979, issued by the Bombay Telephones, on the defendants' address of the suit flat, with regard to the telephone connection. These documents, therefore, show that the defendant has been in possession of the suit flat at least from 1979 onwards.

16. The documents, which are produced by the Plaintiff, are only for the months of February/March, 1981. According to the contention of the defendants, they are all created documents. It is the case of the defendant that when the prices of the flats started rising, the Plaintiff changed his mind and started claiming the suit flat, on one or the other pretext. Getting Ration Card in the name of the Plaintiff; getting issued letters in the name of the Plaintiff on the suit flat's address is not improbable.

17. The Plaintiffs main witness is Jacob Mathew, PW 3, on the point of his possession over the Suit flat.

However, his evidence indicates that he does not have any personal knowledge as to who was staying in the aforesaid suit flat. Therefore, his evidence is of no help to the Plaintiff to show that the Plaintiff was residing in the Suit flat. The another witness, examined by the Plaintiff is his brother in law Bholu Sharma. He being an interested witness, bound to say in favour of the Plaintiff. According to this witness, he was residing with his brother in law i.e. the Plaintiff in the Suit flat during the period of August 1980 up to the date of the incident. Even then, it is surprising to note that the Plaintiff does not state that this Bholu Sharma was also residing with him either before the date of the incident or at the time of incident, which took place on 19.3.1981. Bholu Sharma, PW 2, however, claims that he was present at the time of incident, which took place on 19.3.1981. As such, the version of Bholu Sharma, with regard to the possession of the suit flat by the Plaintiff prior to the date of the incident is not reliable and therefore, not accepted. The Defendnts' Ration Card is produced by the Plaintiff Exhibit P-14. The purpose seems to be that the date of issue of this Ration Card is 12.6.1981, which is changed to 12.6.1979. The Plaintiff has examined the witness Tej Soni from Rationing Office Andheri to say that the Ration Card was issued by the Rationing office on 12.6.1981. In cross-examination,

this witness admits that the Ration Office maintains the corresponding record. However, that Record has not been been produced. On the face of it, the Ration Card shows the change of the Year, 1981 to 1979 at 2/3 places. However, what is material to be noted is that on the ration Card, there is an endorsement of Defendant being **"Gas Consumer ".** The Application for Gas Connection was made on 24.11.1980, as indicated by Exhibit D-17. Therefore, the issue of Ration Card could not be of 1981 because, in that event, the endorsement of "Being Gas Consumer" would not have appeared on the Ration Card. Moreover, there is other evidence, as discussed above, that the defendant was residing in the suit premises and had taken and was using telephone connection in the suit premises in September, 1979. Therefore, this overwriting, as is appearing on the Ration card, will be of no help to the Plaintiff to show his possession over the Suit flat prior to the date of the incident.

18. The Plaintiff has then examined Vishnu Joshi, PW 5, who was Rationing Inspector of Bhayander Ration Office, who has given evidence that the defendant had a Ration Card of his residence of Bhayander. The fact that the defendant had a residence in Bhayander is not in dispute. The Plaintiff has also examined the witness D’Silva, PW 9, from Nazareth School, Bhayander to show that the children of the defendant were studying in that

School at Bhayander. These aspects, however, do not help the Plaintiff in showing his own possession or that the defendant was not in possession of the Suit flat. The defendant admittedly has his residence at Bhayander and some members of the family of the defendant were residing in that accommodation. Therefore, there is nothing wrong if he had a Ration Card of Bhayander. There was also nothing improper in continuing the education of his children in School at Bhayander, although the defendant had started residing in the Suit premises. The other witness Mr. J.S.Valvi, PW 6, from Ration Office at Bhayander has stated that the Ration Card standing in the name of the defendant was cancelled in 1976 and it was not renewed thereafter. This, on the contrary had supported the case of the defendant that he had shifted to the suit premises. Therefore, this evidence is of no help to the Plaintiff. The Witness No.7 Suresh Mistry states that the Vehicle bearing Registration No. MMV 1770, which was owned by the defendant, was showing the address of Bhayander. This also does not help the Plaintiff in showing his possession or that the defendant not being in possession of the suit flat. A person can have two residences and can give the address of either of it for registration of the Vehicle with RTO. It is not improbable or wrong.

19. From the above evidence, it has to be concluded

that the Plaintiff failed to prove that he was in possession of the Suit premises prior to 19.3.1981. As against this the defendant has by his evidence, established that prior to 19.3.1981, he was in possession of the suit flat. Even considering the case on probabilities, the case of the defendant that he was in possession of the Suit premises is more probable, as the Plaintiff had executed an agreement dated 15.10.1976 in favour of he defendant.

20. Worth noting is the conduct of the Plaintiff with regard to the agreement, dated 15.10.1976. For the first time in his evidence, he states that, in fact, that agreement was a loan agreement and not the agreement to sell the suit premises. He also goes to the extent of saying in his evidence that such a separate loan agreement was executed by the Plaintiff and defendant. However, no such agreement has been produced. He has gone to the extent of saying, for the first time, in his evidence that the defendant had forced him to execute certain documents at the time of the incident, which took place on 19.3.1981. But in this regard there are no pleadings as also the proof. In fact, the Plaintiff had started taking action against the defendant, with a view to create this case of dispossession. In the month of February,1981, he lodged NC complaint with the police. The Police, however, did

not take any action. The defendant has produced the Membership Certificate of the Society, in favour of the Plaintiff. According to the defendant this was given to him by the Plaintiff at the time of executing the agreement. But the Plaintiffs made out a new case in his evidence that this Share Certificate, as also some other documents were stolen or forcibly taken away by the defendant at the time of incident on 19.3.1981. This has neither been the case of the Plaintiff in the complaint lodged before the police nor in the plaint of this Suit. It, therefore appears that the Plaintiff has been coming out with false allegations against the defendant and, therefore, he looses trustworthiness and credibility.

21. With regard to the incident, which took place on 19.3.1981 at about 9.30 p.m. also there is no cogent evidence. The Plaintiff sates that the defendant had gone there alongwith 50 persons armed with deadly weapons like swords, knives, iron bars etc. and broke open the side door and latch of the front door and glasses of both rooms and w.c. He admits in cross-examination that there was commotion during the incident and neighbours and others assembled there. It is surprising that Plaintiff has not examined any such witness, who had witnessed the incident. He also stated that during the incident he suffered injuris and,

therefore, was taken by police to Cooper hospital. In support, he has produced the medical certificate at Exhibit P-17. However, that certificate does not mention the name or Buckle Number of the Police Officer or the Police Constable who had taken him to that hospital. The injuries described in the Certificate are minor abrasions. As per the Certificate the Plaintiff was examined on 20.3.1981 and not on 19.3.1981. The age of the injuries is also not mentioned in the certificate. It, therefore, appears that he was assaulted and suffered injuries during the incident is not supported by the medical Certificate.

22. Bholu Sharma, the plaintiff's brother in law has totally exaggerated the incident. According to the Plaintiff the incident took place on 19.3.81 at 9.30 p.m. and went on for about 5 to 10 minutes. Bhole, however, states that the defendant and his associates broke upon the door and entered the flat and started throwing household articles outside the flat. According to him, the defendant and his associates tied the hands of the Plaintiff with rope and dragged out the plaintiff's mother and the Plaintiff was threatened at the point of knife and threatened him with dire consequences. He further states that the incident was going on until the police came there. The evidence shows that police came there at 10.30 p.m. That means,

according to this witness, the incident went on for about an hour. The Plaintiff himself, however, has not stated anything of this sort. Therefore, the evidence of Bholu Sharma and the Plaintiff is contradictory to each other and, therefore, does not inspire confidence.

23. Now coming to the panchanama, which was made by the police, it does not show as to who was in possession. Although it indicates some incident having taken place, it mentions that the panchas and police reached there, the flat was open and the latch was damaged. On entering they noticed that there were two rooms with partition and side window glasses were broken. the clothes and other articles and thing were lying scattered and some utensils were also lying outside the room. The panchanama further mentions that defendant was in the room alongwith his family. This last mentioning in the panchanama that the defendant was in the room alongwith his family makes it clear that the defendant was occupying the flat.

24. It is pertinent to note that the Plaintiff has never said that the members of the family of the defendant also came to the spot at the time of incident. What the Plaintiff stated was that the defendant had come alongwith 50 gundas, who were carrying deadly weapons. Therefore, the last mention in the panchanama

makes it clear that the room was not only occupied by the defendant but also by the members of his family. It is not clarified by the Plaintiff as to when the members of the family of the defendant came there and occupied the premises. The Plaintiff was present there right from the incident which started at 9.30 p.m. till the police came there and drew the panchanama. Therefore the Plaintiff would have definitely stated that as to when the members of the family of the defendant came there and entered the premises. When the Plaintiff does not explain this, he cannot state that he was in possession of the flat even at the time of incident.

25. The Plaintiff has produced the extract of his Bank Account with Vijaya Bank Ltd. at Exhibit P-9. However, that account was opened on 19.10.1982 showing the address of the Suit premises. This certainly does not help the Plaintiff to prove that the Plaintiff was in possession of the Suit premises. On the contrary it shows the capacity of the Plaintiff to manipulate the things. It is clear from the Plaintiffs own case that the defendant came to occupy the suit premises at the time of incident, which took place on 19.3.1981 and the plaintiff was denied the entry in the suit flat and the Plaintiff never occupied the suit premises thereafter. Even then he could get the address of the suit premises notified on the pass-book of his account with Vijaya

Bank which he opened on 19.10.82, shows his capacity to manipulate the things and, therefore, cannot be trusted at all.

26. The Plaintiff had also filed a private complaint against the defendant in Magistrates Court, with regard to the same incident, which took place on 19.3.1981 The the defendant was acquitted in that case. The Plaintiff had also filed the proceedings Under Section 145 of the Criminal Procedure Code; but since the defendant had filed Suit in City Civil Court for injunction against the Plaintiff, the Plaintiff withdrawn the proceedings filed under Section 145 of the Code of criminal Procedure. In the Suit which the defendant had filed in City Civil Court, being Suit No. 1783/81, the present defendant had obtained injunction against the plaintiff in the said Suit, restraining this Plaintiff from obstructing the possession over the Suit flat.

27. Be that as it may, as discussed above, the Plaintiff failed to prove his possession over the Suit premises, prior to the date of the incident, which took place on 19.3.1981. The Plaintiff also failed to prove that he has been forcibly dispossessed from he Suit Premises. He also failed to prove that the defendant had dispossessed him from the Suit premises without his consent and otherwise than in due process of law. As

such all the three issues shall have to be answered in the negative.

. **As to Issue No. 4:**

28. In view of my findings on the aforesaid issues in the negative, the Plaintiff is not entitled to possession of the Suit flat under the provisions of Section 6 of the Specific Relief Act. This issue, therefore, answered in the negative.

29. Consequently, the Plaintiff's Suit shall have to be dismissed with costs. Hence, the Order :-

ORDER

1. The Suit is dismissed with Costs.

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**[S.K.SHAH, J.]**

IN THE HIGH COURT OF JURIDCATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1605 OF 1983

Date of Decision : 11th August, 2005.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the Judgment should be sent to Nagpur, Goa and Aurangabad office?

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
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VERSUS

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MR.A.B.PATKI FOR THE RESPONDENT/DEFENDANT.

**CORAM : S.K.Shah, J.**
**DATE : August 11, 2005.**

P.C.

For the reasons separately recorded in the Judgment, the following Order is passed :-

O R D E R

1. The Suit is dismissed with costs.

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**[S.K.SHAH,J.]**